SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-00325-D

JAMES CARTER **MOVANT/APPELLANT**

vs. **On Appeal from Kentucky Court of Appeals**
Case No. 2012-CA-000192

BULLITT HOST, LLC
D/B/A HOLIDAY INN EXPRESS **RESPONDENT/APPELLEE**

RESPONSE BRIEF OF RESPONDENT/MOVANT, BULLITT HOST, LLC D/B/A HOLIDAY INN EXPRESS

Respectfully submitted by:

R. Hite Nally, Esq.
hnally@weberandrose.com
Russell H. Saunders, Esq.
rsaunders@weberandrose.com
WEBER & ROSE, P.S.C.
471 W. Main Street, Suite 400
Louisville, Kentucky 40202
Phone: (502) 589-2200
Fax: (502) 589-3400
Counsel for Appellee, Bullitt Host, LLC d/b/a Holiday Inn Express

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that an original and ten (10) copies of this Respondent/Appellee's Response Brief was mailed via Registered Mail, postage prepaid, this 9th day of June, 2014, to Hon. Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, 209 Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601 and one copy of same to: Hon. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Audra Eckerle, Judge, Jefferson Circuit Court, Division 7, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202; and Hon. A. Neal Herrington and Hon. Marc K. Crahan, Hargadon, Lenihan & Herrington, PLLC, 713 West Main Street, Louisville, Kentucky 40202, *Counsel for James Carter.*

R. Hite Nally, Esq.
Russell H. Saunders, Esq.

COUNTERSTATEMENT CONCERNING ORAL ARGUMENT

Respondent/Appellee, Bullitt Host, LLC d/b/a Holiday Inn Express, respectfully submits that it does not believe oral argument will assist this honorable Court in deciding this case unless the Court has questions of policy with respect to the application of the law in Kentucky regarding injuries due to naturally-occurring outdoor substances.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-00325-D

JAMES CARTER — MOVANT/APPELLANT

vs.

BULLITT HOST, LLC
D/B/A HOLIDAY INN EXPRESS — RESPONDENT/APPELLEE

COUNTERSTATEMENT OF THE CASE

Respondent/Appellee, Bullitt Host, LLC d/b/a Holiday Inn Express (hereinafter "the Holiday Inn"), cannot accept the Statement of the Case submitted by Movant/Appellant, James Carter (hereinafter "Carter"), because it does not accurately and fairly depict the record and asserts a factual proposition that is misleading if not outright false.

There is, however, one area of agreement regarding the facts. The parties are in agreement that the reason for the Carter's unscheduled stop in Bullitt County was due to adverse weather conditions in the form of a relatively severe winter storm that required them to pull off the road because it was unsafe to drive any further north that day.

Carter's Statement of the Case also lacks any sort of meaningful discussion of what the evidence before the trial court actually was that was also reviewed and considered by the Court of Appeals. Instead, Carter offers sweeping, broadly-based generalities and his own summations of the evidence in

the form of bullet points. For this additional reason, the Holiday Inn respectfully submits its Counterstatement of the Case so this honorable Court has a better grasp of what the record truly reflects.

Information obtained from NOAA, National Climatic Data Center in Louisville indicates that very near the time of Carter's accident, the winter storm from the previous evening had not abated, and freezing rain was recorded as occurring at 7:00 A.M. These records, a copy of which is attached as Exhibit "A," also indicated a snow total in excess of four (4) inches. These records were attached to the Holiday Inn's initial Motion for Summary Judgment as an exhibit. (Clerk's Record on Appeal, pp. 187-257).

It is also undisputed that the Holiday Inn only had two employees working at the time of Carter's fall which was at approximately 6:50 AM, one of whom was the front desk clerk and the other, the manager of the breakfast bar. The front desk clerk worked from 11:00 P.M. until 7:00 A.M., and the breakfast bar manager arrived at 5:00 A.M. (Patel Depo., p. 76 @ 19-20).

Woven throughout Carter's Brief is the inference that where he slipped was closer to the front door under the canopy rather than closer to the uncovered parking lot, which is where, during his deposition, he testified he actually was. He infers throughout his Brief that he was in a sheltered place. This is a critical consideration in view of the position he has taken in his Brief.

To be precise, Carter has contended previously that any precipitation under the canopy was not directly weather-related. He has offered no evidence

to demonstrate that this is a fair inference to be drawn, and the Court of Appeals rejected such reasoning as being speculation.

As such, in his Statement of the Case, he asserts that he was walking "under the covered walkway." (Brief, p. 1). Similar statements appear elsewhere when Carter contends he was walking "under the walkway" when he fell, again suggesting that he was safe (or should have been) from any weather-related harm. (Brief, p. 1). These statements are misleading since his testimony is to the contrary. He also asserts that "he did not see any snow or snow tracks under the walkway." (Brief, p. 1).

While he may not have seen "any snow or snow tracks under the walkway," according to his own testimony, Carter observed from *inside the building* that the surface under the canopy was wet. In his words, he noticed the wetness under the canopy "before [he] walked out the door," and he admitted knowing that water freezes at 32 degrees Fahrenheit (Carter Depo., p. 117, @ 5-21, p. 131 @ 21-25, p. 132 @132). Because it was wet, he testified that he walked "extremely slow." (Carter Depo., p. 127 @ 15-16).

He also admitted, after noticing the outdoor conditions that "I need to be safe" when walking to his vehicle. (Carter Depo., p. 117 @ 10-23). Finally, he admitted that the combination of moisture and freezing temperatures meant he had to be careful because there would likely be ice. (Carter Depo. pp. 129-130).

Both the trial court and the Court of Appeals pointedly remarked on Carter's subjective awareness of the conditions existing beyond the doors of the Holiday Inn. In doing so, the Court of Appeals focused its attention on *Standard Oil v. Manis*, 433 S.W.2d 856 (Ky. 1968) and the law cited therein. Despite this case being the crux of the Court of Appeals' Opinion, Carter does not mention it even one time in his Brief.

Contrary to what Carter has represented in his Brief, he was asked during his deposition to indicate where he fell and he placed his fall at the ***edge*** of the canopy, or walkway to use his terminology. (Carter Depo., p. 134, line 25; Exhibit I). In fact, he circled on two of the photographs filed as exhibits to his deposition, the location of his fall and it was where the concrete under the open canopy meets the asphalt parking lot. (Carter Depo., p. 164, line 21 through p. 165, line 12). One of these photographs that shows where he fell is attached hereto as Exhibit B and it his marking on the photograph demonstrates that he was barely under the canopy, if at all.

What is significant is that Carter was on the cusp of walking into several inches of snow in order to reach his vehicle to start it up. The trial court noted "the area in which the Plaintiff purportedly fell was not enclosed. It was exposed to the elements, including the accumulation of freezing rain drifting through the open sides." (Opinion and Order Granting Summary Judgment, p. 4; Clerk's Record on Appeal, p. 427). Armed with this knowledge, Carter had every notion of proceeding toward his vehicle regardless of how snowy and ice-covered his

chosen path may have been. During this deposition, Carter indicated where his vehicle was parked, and there were alternate paths he could have taken upon leaving the front door that would have taken him to his vehicle.

Carter also refers to snow-removal efforts undertaken by the Holiday Inn, and he attempts to infer that there was something negligent about the way this was handled. In his Brief, he makes the following statements: "Respondent regularly hires a company for ice and snow removal" and "[d]espite knowledge of inclement (sic) weather, Respondent made no attempt to clear the snow and ice." (Brief, p. 1).

It is true that the Holiday Inn consistently used independent contractors to remove snow and ice, and did not attempt to do so using its own personnel that at the time of Carter's fall included only the front desk clerk and the breakfast room host. (Patel, Depo. p. 76, 8-12). There were no formal contracts in place to get this done, and the job of snow/ice-removal went to the first person/company offering such services. The Holiday Inn did not have any snow removal equipment as would be necessary to clean the parking lots. (Patel Depo. p. 45, 2-8).

The size of the parking areas of the Holiday Inn were relatively large as represented by the photographs introduced into the record, including the ones attached to this Brief as Exhibit "B". Clearing snow and ice from the parking lots, of the size of the ones at the Holiday Inn, was beyond what the employees on duty at the time could accomplish especially in the absence of a snow plow.

Given the size of the parking lots, the job would have required far more to get it done adequately than could be accomplished by two people using a snow shovel, a snow blower, or a few handsful of potassium chloride. Furthermore, even if Carter had successfully navigated the area under the canopy, he still had to traverse a parking lot that was snow-covered unless it was cleared later that day after the snow-removal company arrived.

Throughout all relevant times and thereafter, the winter storm continued. Weather records introduced into evidence showed that adverse winter weather was continuing up until the time of Carter's fall and, in fact, according to Mrs. Carter, it was still snowing at 11:00 AM although it was not as intense as it had been earlier. (T. Carter Depo, p. 60, 9-11). The temperatures were below freezing at the time of Carter's fall and the records in Exhibit A show the presence of a mixture of snow, ice pellets and freezing drizzle.

Carter's Brief also misconstrues the procedural sequence of events that led to the trial court's granting of the second Motion for Summary Judgment. To be precise, Carter incorrectly states that the reason for the trial court's change in its ruling was due to a shifting view of the evidence. (Brief, p. 2). His discussion on this point suggests improper flip-flopping as a predicate for error. The trial court merely followed its solemn obligation to follow precedent as handed down by higher courts.

ARGUMENT

I. The Rulings of the Lower Courts Should be Affirmed.

CR 56 of the Kentucky Rules of Civil Procedure provides that summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. This Court has ruled that summary judgment is only appropriate if it would be impossible for the non-moving party to prevail. Impossible is not meant to be used in the sense of an absolute impossibility, but rather a practical one. See, *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991); *Perkins v. Hausladen*, 828 S.W.2d 652 (Ky. 1992).

Carter argues in his Brief that the adoption of *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010) and cases decided thereafter compel reversal of this case. The Holiday Inn respectfully disagrees and fervently believes that the precedent expressed therein is distinguishable because *McIntosh* and the cases decided thereafter simply do not involve a naturally-occurring outdoor hazards as the present case plainly does.

Even with *McIntosh*, *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013), and *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901 (Ky. 2013) as precedent, the Holiday Inn firmly believes it is entitled to summary judgment under the facts of this case. Regardless of the basis for summary judgment as found by lower courts, if summary judgment is warranted on any basis, it *must* be affirmed. See, *Fischer v. Fischer*, 197 S.W. 3d 98 (Ky. 2006).

A. *Standard Oil v. Manis* is Controlling.

As mentioned earlier, even though *Standard Oil v. Manis*, 433 S.W.2d 856 (Ky. 1968) figured prominently in the reasoning of the lower courts, especially the Court of Appeals, Carter has ignored it completely in his Brief. *Manis* has been one of the leading cases in this Commonwealth on outdoor natural hazards since 1968 and it should remain so. This Court has followed it as recently as 2005. A thorough discussion of *Manis* is necessary at this juncture.

In *Manis*, a truck driver delivered a shipment of gasoline and was required to cross a wooden level walkway and then step up to an elevated platform in order to reach a pump house where he had to throw a switch which would enable him to make the delivery. Upon reaching the platform, Manis slipped and fell, injuring his back. Ultimately, this Court concluded that Manis had not stated a cognizable claim for premises liability.

Manis is one of the leading cases adopting a different standard with respect to outdoor natural hazards versus those involving artificial conditions occurring, primarily, though not necessarily, indoors. The opinion begins with the following observation: "Falling cases are myriad, but in a great many of them the accident has taken place indoors and resulted from artificial conditions. In light of the principles above set forth, events occurring outdoors as the result of exposed natural conditions present a somewhat different problem." *Manis, Id.* at 857. The Holiday Inn could not agree more.

Due to this distinction, *Manis* is one of the leading cases that adopted the standard regarding the liability of a premises owner for injuries occurring as a result of naturally-occurring outdoor substances. Assuming that the premises owner does not make the condition worse by remedial measures, as a rule, a landowner does not owe a duty to warn or a duty to remove hazards resulting from *naturally-occurring outdoor* substances if the condition is as obvious to the invitee as it would be to property owner. This has been the law since 1968 and has been followed or cited with approval in earlier cases from this Court, even after the adoption of comparative negligence, including *Horne v. Precision Cars of Lexington*, 170 S.W.3d 364 (Ky. 2005), *PNC Bank, Kentucky v. Green,* 30 S.W.3d 185 (Ky. 2000) and *Corbin Motor Lodge v. Combs*, 740 S.W.2d 944 (Ky. 1987).

The Holiday Inn is well aware of *McIntosh* and the cases that followed. In *McIntosh*, the open and obvious rule was held to be inconsistent with current trends in the law when it was demonstrated by the evidence that a person injured by a defect on the property, which was otherwise open and obvious, was foreseeably distracted so that prior knowledge of the condition was forgotten or mitigated. In *McIntosh* the injury occurred when a paramedic was injured when she was rushing a patient to the emergency room of a rural hospital and fell over an open and obvious concrete curb.

The Holiday Inn is also well aware of *Dick's Sporting Goods v. Webb*, 413 S.W.3d 891 (Ky. 2013), which was found to be not an open and obvious case at

all, and *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 891 (Ky. 2013). The Holiday Inn also believes these cases are distinguishable and both will be discussed in greater detail presently.

However, despite these recent rulings, the Holiday Inn is further aware of the following language from *Corbin Motor Lodge*:

> There are persuasive considerations which favor the rule enunciated in *Standard Oil Company v. Manis, supra*. There are also some reasonable arguments for a different ruling. We do not think the law in this area, as it exists today, reaches an absurd result or that a change in the present law is compelled in order to avoid grave injustices. Unless the need to change the law is compelling, the majority of this court is of the opinion that stability in the law is of sufficient importance to require that we not overturn established precedent which itself is based upon a reasonable premise. *Id.* at 946.

Snow removal for an entire parking lot and adjacent pavement is not as simple as merely wishing it were gone or snapping ones fingers to make it go away. It is not an instantaneous process.

Even the City of Louisville was embarrassed by what happened in 1994 when what few pieces of snow removal equipment the City owned were found to be inoperable or inadequate. Quite frankly, it is respectfully submitted that snow removal is not something that happens in the bat of an eye even in a northern clime like Minneapolis or Winnipeg. For this reason alone, *Manis* should remain the law of the Commonwealth and apply to the facts of this case.

1. *City of Madisonville v. Poole* Is Not Controlling.

Rather than discuss *Manis,* Carter has instead referred this Court to *City of Madisonville v. Poole*, 249 S.W.2d 133 (Ky. 1952). The fact that *Poole* predates *Manis* by sixteen (16) years renders its value as precedent questionable from the outset. Not only this, but also *Poole* is distinguishable in one key respect: Ms. Poole never saw the ice that caused her to slip in the darkness of the covered porch. In this sense, she is much like Ms. Webb who did not see the water on the tiled floor of the sporting goods store when she entered.

While there are a number of cases from this Court citing *Manis* with approval, quite a few predate the adoption of pure comparative negligence. Nonetheless, there are several others, in addition to *Corbin Motor Lodge* that came afterwards, one of which was *PNC Bank, Kentucky v. Green,* 30 S.W.3d 185 (Ky. 2000) that cited *Manis* with approval.

2. Kentucky Has Rejected any Duty of Requiring Constant Vigilance.

PNC Bank disposes of several of the contentions advanced by Carter in support of his argument that the lower courts erred. In that case, the plaintiff fell on an icy sidewalk as she entered a bank. Bank employees had intermittently spread a melting agent on the sidewalk, but had not done so for approximately one and one-half hours. The plaintiff acknowledged the overall wintry weather conditions plus the fact she admitted observing that the parking lot and sidewalk were icy and slippery. Despite the fact that she had been "walking on eggs"

earlier in the day to avoid falling, Mrs. Green slipped and fell as she approached the bank. Her testimony was remarkably similar to Carter's herein.

In rejecting her assertion of liability, this Court cited *Manis* with approval and found the evidence supported the entry of summary judgment for PNC Bank because the outdoor conditions were as obvious to Mrs. Green as they would have been to a bank employee and there was nothing the bank did to increase the hazard. Precisely the same result should obtain in this case.

Carter's trip was cut short due to the weather and he admitted seeing that the surface under the canopy was wet and therefore most likely icy. Unlike *Poole*, Carter admitted that the surface was *not only* visible, *but also* wet. He had actual knowledge of everything he needed to know to prevent injuring himself, including remaining inside the Holiday Inn. Since he could see from inside the building that the exterior surface under the canopy was wet, he is to be charged with the knowledge that as an undeniable scientific fact that water freezes when temperatures reach the freezing point and there are no ifs, ands, or buts about it.

This is a hazard that is known and appreciated by all, and the *uncontradicted* record shows that it was below freezing at all pivotal times. There is simply no escaping the fact that any wet surface, and the *entirety* of that wet surface, is going to be icy. Carter admitted to this knowledge. It is absolutely impossible for any portion of it *not* to be icy when the temperatures are below freezing, as they were when Carter went outside.

Carter also argues that because the Holiday Inn had engaged the services of snow removal contractors in the past that this somehow changes the duty owed to him. He extends this argument to the next level by contending, without citing any authority, that the Holiday Inn had assumed the duty of snow removal by virtue of hiring private contractors to do it for the property. He also has argued that the Holiday Inn had a policy of policing the grounds, but the only evidence of record is that the purpose of this once-a-day policing was to remove litter, etc. and had nothing whatsoever to do with snow and/or ice removal. (Patel depo., p. 44, 17-19).

The imposition of just such a duty has been rejected by this Court. First of all, the Holiday Inn was under no duty to do anything and even if it had, this Court has rejected, as a matter of public policy, the contention that the assumption of a duty to remove snow or other natural elements converts the property owners into some sort of insurer. As stated in *PNC Bank*:

> PNC Bank attempted to clear its sidewalk of ice and snow for the safety of its customers. Yet, given the fact that it was intermittently snowing and sleeting that day, it would have been virtually impossible for bank employees to have maintained a constant watch over the condition of the sidewalk. More importantly, nothing that PNC Bank did made the natural hazard any less obvious or increased the likelihood that Green would slip and fall. We are of the opinion that it is against public policy, and even common sense, to impose liability on those who take reasonable precautions if such does not escalate or conceal the nature of the hazard, while absolving those who take no action whatsoever. *PNC Bank, Id.* at 187-188.

The Holiday Inn could not agree more with this balanced view. *PNC Bank* stands for the proposition that a property owner is not required to constantly monitor any conditions resulting from naturally-occurring outdoor hazards. It should be recalled that when Carter went out to his vehicle at 6:50 A.M. the winter storm *had not stopped*. His wife said it was still snowing at 11:00 A.M. Teresa Carter Depo., p. 60 @ 9-11).

Consistent with *PNC Bank*, other jurisdictions follow the rule that there is no duty to remove snow and/or ice in the midst of an ongoing storm. Requiring a landowner to maintain a constant vigilance is both unreasonable and "virtually impossible." *PNC Bank, Id.* at 187-188.

Simply put any duties to remove snow and/or ice, to the extent they existed at all, are suspended until a reasonable time after the storm has abated. See *Cash v. East Coast Prop. Mgmt., Inc.*, 7 A.3d 484 (Del. 2010); *Beradis v. Louangxay*, 969 A.2d 1288 (R.I. 2009); *Small v. Coney Island Site 4A-1 Houses, Inc.*, 814 N.Y.S.2d 240 (N.Y. App. Div. 2006); *Clifford v. Crye-Leike Comm., Inc.*, 213 S.W.3d 849 (Tenn.App. 2006); *Amos v. Nationsbank, N.A.*, 504 S.E.2d 365 (Va. 1998); *Agnew v. Dillons, Inc.*, 822 P.2d 1049 (Kan.App. 1991); *Kraus v. Newton*, 542 A.2d 1163 (Conn.App. 1988). These authorities are completely consistent with the view expressed in *PNC Bank*.

Carter never favors this Court or the Holiday Inn with a time when it would have been acceptable to have the parking lots cleaned. By his logic, he is imposing the impossible standard rejected by *PNC Bank* that would have

required constant vigilance. What if he wanted to leave at 3:30 A.M.? Would he have still expected the Holiday Inn to have cleared its property? This sort of Johnny-On-The-Spot requirement should be rejected outright as totally unreasonable and impossible to discharge as a practical matter given the ongoing nature of the storm and further, that snow plows are not omnipresent.

This should be contrasted with the showing in the present case and the basis for reversal Carter has argued. Carter has attempted to make much of the fact that the Holiday Inn should have called a company to clear its parking lots before he fell and not afterwards, which snow removal occurred later after the snow storm had abated. Not only is this not the law in Kentucky, but also he assumes that snow removal services were available no matter the ongoing nature of the storm whenever he chose to check-out whether it was 6:50 AM, 4:00 AM, or midnight. Like money, snow plows do not grow on trees. The duty to perform services such as this must be viewed in the context of what is reasonably possible. Otherwise one is dreaming the impossible dream.

B. The Burden-shifting Approach Adopted in *Lanier v. Walmart* Does Not Apply to the Facts of this Case.

Carter urges this Court to apply the burden-shifting approach first adopted in *Lanier v. Walmart*, 99 S.W.2d 431 (Ky. 2003), to the facts of this case. It is respectfully submitted that doing so would undermine the rationale of *Lanier* and progeny by expanding liability to the extent that premises owners become insurers and liable under all circumstances. Kentucky has never gone this far

and the courts have gone to great pains to stress how being an insurer is not the standard; rather, it's the concept of what is reasonable behavior and what is not.

1. A Different Standard Should Apply to Naturally Occurring Hazards.

Carter also argues that the hazard from snow and ice is "transient." (Brief, pp. 7-9). While it is true that snow and ice are transient in the sense that they will eventually melt as temperatures rise, transient as used in *Lanier* and progeny obviously referred to conditions created by third persons resulting in hazard to unsuspecting persons who followed behind them that could be remedied relatively easily upon proper inspection. *Lanier* was concerned with conditions that were transient and would not go away on their own.

In some cases, the condition can be remedied in short order by an employee armed with nothing more sophisticated than a paper towel or a mop and bucket to swab up a spilled liquid, for example. In all of the cases, the hazardous condition was one that was within the power and *control* of the premises owner to remedy on his/her/its own. The Holiday Inn cannot imagine applying this standard to a naturally occurring condition covering every square foot of the outdoor area that cannot be remedied in the absence of the proper equipment and sufficient manpower, especially while a winter storm is ongoing.

It is also well known that snow, ice, and freezing rain do not necessarily fall in a straight line from the sky as might, say, a bowling ball. It is commonly known that snow, for instance, frequently does not fall in this fashion. Common phrases, such as "pure as the driven snow," "wind-driven snow," and references

to how high the snow has drifted in a particular location are common during the winter.

Precipitation of all sorts moves in tandem with the prevailing winds. This is beyond question. Accordingly, Carter's argument that the ice, etc. under the canopy falls within the burden-shifting approach must be rejected as at odds with the laws of physics and nature, and his argument that he should have been sheltered from whatever fell from the sky while at the edge of the canopy must also be rejected.

2. A Verdict May Not Rest Upon Speculation.

Furthermore, Carter's attempts to attribute the moisture to other sources must be rejected for not only these meteorological truths, but also because he has offered no evidence, and in fact it's impossible to produce any, of another source other than by means of resort to speculation. He denied seeing any automobile tracks under the canopy. Speculation, however, can never serve as a basis upon which to affix liability. See, *Briner v. General Motors Corp.*, 461 S.W.2d 99 (Ky. 1970). A more plausible explanation under the facts of record is that the precipitation from the severe winter storm entered the open-sided canopy as a part of the weather conditions existing at the time. As argued above, blowing snow is hardly something that is surprising, novel, or otherwise noteworthy. Such was the ruling of the trial court.

3. The Rationale of *Lanier* is Inapplicable.

As stated in *Lanier*, this Court felt that prior precedent had imposed an inequitable burden on invitees injured on the premises of another when they encountered a condition created by a third party. This Court reasoned that it was unfair to require a person injured on real property to prove how long a particular foreign substance or dangerous condition had been present so as to provide an inference of negligence arising from the length of time the condition existed.

To redress this inequity, this Court turned to the Restatement of Torts, Second and chose the burden-shifting approach as a means of correcting this unfairness. It is important to be mindful of the fact that this approach only applies to conditions created by third parties. As yet, it has not been applied to naturally-occurring conditions created by the weather. An examination of the primary case cited by Carter in his Brief for applying burden-shifting more than bears this out and provides ample reason why the burden-shifting approach should *not* be applied to the case at bar.

4. *Martin v. Mekanhart Corp.* Did Not Involve a Naturally-Occurring Condition.

In *Martin v. Mekanhart Corp.* 113 S.W.3d 95 (Ky. 2003), a patron of a Frisch's Restaurant slipped while exiting one of its franchises. When the plaintiff arrived with a friend, Ms. Martin parked in a space in front of the restaurant near the entrance. Another vehicle was parked to the immediate left of her car and Ms. Martin exited her vehicle, walked between the two vehicles to the sidewalk,

which ran in front of the restaurant by some plate glass windows, turned left, and then entered the restaurant via the sidewalk.

Upon leaving the Frisch's, the vehicle to the left of her vehicle had gone, and Ms. Martin began walking across the now-vacant parking space. In doing so, Ms. Martin slipped on a slick substance and fell to the pavement, receiving injuries. The slick substance appeared to be motor oil that had dripped from customers' vehicles. Part of the motor oil appeared fresh. The place where she fell was readily visible from inside the restaurant. In fact, two police officers eating inside observed Ms. Martin's fall.

a. Frisch's Assumed the Duty of Maintaining its Property and Actually Had the Means by Which to Do So.

The evidence demonstrated that this Frisch's employed several means to address the problem of oil on the pavement since it was described as a "common" occurrence. *Martin Id.* at 97. "For safety reasons" this Frisch's had its parking lot "scrubbed and hosed on a weekly basis and steam-cleaned twice a year." In addition, the Frisch's engaged the services of a professional sweeping service to clean its parking lot and that of an adjacent commercial parking lot every two weeks. *Martin, Id.* at 97.

Employees were also instructed to police the grounds four (4) times each day at "6:00 a.m., 8:00 a.m., 2:00 p.m., and 4:00 p.m." to check for "anything unusual, litter, bottles, etc., to pick up big items on lot and to clean all outside areas." *Martin, Id.* at 97. More significantly, however, Frisch's also had on hand

an "oil absorbent material" that employees were to use "to spread on the oil spots to soak up the liquid."

The Frisch's manager could not testify when any of the aforementioned actions had last occurred and *none* of the oil absorbent material was found on Ms. Martin's clothing. There was also evidence introduced from another person that she had never seen Frisch's using the oil absorbent material until *after* Ms. Martin's fall when she observed the manager and other employees scrubbing the spot where Ms. Martin had slipped.

Therefore, this particular Frisch's had undertaken the affirmative duty of cleaning its parking lot to eliminate the very hazard at issue in that case, i.e., oil slicks. Frisch's had the means at hand and in house to remedy the hazard on its own and presumably do so economically using its own personnel. There was no special skill set or equipment required. Frisch's could *control* the situation once the condition was created by a patron with a leaky crankcase.

It was also significant in *Martin* that there was an absence of evidence to show when, if ever, these remedial measures had been undertaken. Obviously, all of these measures were within the scope of what the employees of Frisch's could achieve on their own and had been affirmatively instructed to do.

Aside from the fact that the Holiday Inn did not undertake snow/ice removal, and used independent contractors for this purpose, it is also obvious that without the proper equipment, the Holiday Inn could not have safely cleared the snow/ice from the property after a severe winter storm assuming there was a

duty to do so in the first place and sufficient equipment and personnel were available. Without having the proper equipment to use, it would impose an impossible duty to discharge since there is no duty to procure such equipment in the first place under existing precedent. See, for example, *PNC Bank.*

Unlike Frisch's, the Holiday Inn did not have the means at hand to remedy the condition in the first place and the danger of making the condition worse would have been heightened. It should also not be forgotten that the Holiday Inn had only two employees on duty at the time of Carter's fall and there is no duty imposed on an employer, save a hospital where staffing levels are mandated, to hire employees to handle emergencies and contingencies as they arise. This is simply too onerous a burden to impose on any business owner.

This set of facts should be contrasted with those in the present case. Unlike motor oil from a dripping crankcase, ice and snow are naturally occurring outdoor substances, and simply do not fall within the new rules now applicable to hazardous conditions created by third persons as formed the crux of the cases in which the burden-shifting approach was followed. In none of the cases in which the burden-shifting approach was utilized was the "hazardous" condition created by nature and there was nothing done by the Holiday Inn that made the condition more dangerous. Had that been true, then there would be no need to resort to burden-shifting because liability would have attached under Kentucky precedent that long predated the adoption of the new standard.

In fact, the *Webb* court makes it more than abundantly clear that the facts therein were more than sufficient to satisfy the stricter standard in *Cumberland College v. Gaines*, 432 S.W.2d 650 (Ky. 1968), which was subsequently overruled. The burden-shifting approach does not apply to the facts of this case nor should it as a matter of policy.

C. The Holiday Inn Did Not Abandon Any Duties.

In this regard, Kentucky has followed the rule about a duty once undertaken cannot be abandoned without exposing a party to potential liability. The evidence is uncontradicted in this case but that the Holiday Inn engaged the services of independent contractors for snow/ice removal to clear its parking lot in the event of bad weather, and did so on this occasion. In fact, the snow removal services were performed that same day after the snow storm abated.

However, the earlier weather had been so bad that it was the only reason for cutting short Carter's trip to Ohio to pick up a motorcycle in the first place, and it was only for his family's comfort and convenience that he ventured out to their vehicle to warm it up that morning at the early hour that he did. Unlike the situation in *McIntosh*, there was no urgency whatsoever regarding the time for their departure, a point made by the Court of Appeals in its Opinion and he certainly wasn't distracted or forgetful.

While it may seem appealing to extend the *McIntosh* rule, as refined by *Shelton*, to naturally occurring outdoor substances, the old maxim about "hard cases making bad law" rings true in the present case. Quite frankly, this is not

the case to do it. Carter's conduct cannot satisfy any of the tests espoused by this Court's recent precedent.

D. *McIntosh* and The Cases That Followed It Should Not Apply to the Facts of this Case.

For the purposes of analysis and the application of existing precedent, there is no evidence whatsoever that any of Carter's decisions, whether the time of their departure, the route he chose to get to his vehicle, or the reason for doing so, was based upon any emergency or was the only conceivable alternative. Clearly there was no pressing need to resume their trip or else the Carters would not have decided to interrupt their trip the evening before due to the severe winter storm.

The most logical alternative would have been to simply wait to leave. Aside from the fact that there was no rush to leave, the uncontradicted evidence is that the winter storm was ongoing. Nothing compelled them to leave at 6:50 A.M. Haste truly does make waste.

To summarize, he was watching very carefully where he was walking so there is no evidence he was "distracted" per *McIntosh*, and there was certainly no "urgency" about the family's early departure to Ohio to pick up a motorcycle, also per *McIntosh*. He could see – before he ever set foot outside – that the conditions were such that ice would be present in addition to Carter admitting, "I need to be safe" as he walked across the premises. Unlike Ms. Webb, he was admittedly aware of the circumstances.

E. There is No Evidence of a Breach of Any Duty to Exercise Reasonable Care by the Holiday Inn.

In late 2013, this Court issued its holding in *Shelton* to address confusion engendered by *McIntosh*. *Shelton* clearly did not involve hazards arising from naturally-occurring outdoor conditions, but rather the placement of certain items of medical equipment. From this the facts were measured in the context of the four essential elements needed to prove actionable negligence. As set forth previously in this Brief, the Holiday Inn firmly believes that the precedent set forth in *Manis* should remain viable and controlling in this case. However, even if the focus becomes breach of duty rather than the absence of same, it is respectfully submitted that the Holiday Inn is still entitled to summary judgment under the facts of this case.

Shelton addressed the so-called open and obvious doctrine in the context of a person who tripped over the wires that were being used as part of a treatment plan. There was no question but that the medical equipment was necessary for use in treating the patient. There was also no question but that the patient's family was considered to be an essential part of the treatment plan, and their presence was encouraged.

However, the placement of various items, including the patient's bed and the wires, became the focus for this Court. The bed was placed in a corner against a wall so that access to two sides of the bed was blocked by the room's walls which forced Ms. Shelton to interact with the wires. The injured family

member had actual knowledge of the wires and had complained about them, but in bidding her husband goodbye and leaning over to kiss him, she became entangled in the wires and fell, sustaining injury. Rather than allow the absence of a duty to automatically preclude recovery under the open and obvious doctrine, as had been the case pre-*McIntosh,* the decision in *Shelton* was made to shift the focus to whether there was any evidence to demonstrate a breach of the duty to exercise ordinary care by Cardinal Hill with respect to the placement of items referred to above.

This Court ultimately ruled that the case needed to be remanded for a determination by a lower court with respect to whether there were options to the placement of the bed (up against a wall in a corner) and the wires that would have allowed the treatment plan to continue and simultaneously reduce the risk of the tripping hazard.

However, this Court went on to add that if the overall configuration of the room was such that it was the "only manner that enabled Cardinal Hill to properly care" for the patient .... "then it cannot be said that the duty of reasonable care has been breached. Under those circumstances, Cardinal Hill would have done everything reasonably possible." *Shelton, Id.* at 918. From this it follows that summary judgment would remain viable.

The linchpin is "reasonably possible," not just "possible." Anything is, in a sense, possible. The universal duty to exercise ordinary care for others has always been couched in terms of reasonableness, not perfection. Kentucky has

never gone so far as this and, to the contrary, even *Shelton* retains the concept that premises owners are not insurers.

It is respectfully submitted that "reasonably possible" entails something over which the landowner has control so that choices can be made among different options. After all, Cardinal Hill could control the placement of the wires and Mr. Shelton's bed. Whether it should have done anything differently was the proverbial open question given the evidence or lack thereof.

One element of the present case over which the Holiday Inn had no control was the weather and the duration of the storm. The evidence is uncontradicted that the area was in the grips of a continuing winter storm that the Holiday Inn (and Carter) were powerless to control. The image is similar to that scene from the classic "*The African Queen*" in which the German officer and Katherine Hepburn exchanged words after she and Humphrey Bogart were captured on a lake during a storm. The officer demands to know why they were out "boating" at that time and Katherine Hepburn responds unflinchingly, "We were not responsible for the weather!" Much the same is true herein and is precisely why this Court should not abandon *Manis*.

The Holiday Inn also has no control over when snow removal services are available. This is a function of the amount of equipment in the area and where it is being used at any given point in time. Most motorists would agree that there are not nearly enough snow plows/salt trucks around here to suit them, and it is a

matter of common knowledge that the weather in the Ohio Valley is extremely changeable.

Of course, the record shows that the adverse weather was continuing so the snow removal efforts could conceivably have been a nonstop procedure lasting all night. Yet this is precisely what Carter claims the Holiday Inn did that was negligent.

Finally, the Holiday Inn had no control over Carter's volitional acts. It was his decision, and his decision alone, to leave the safety of the Holiday Inn even though he had actual knowledge of hazardous conditions outside which were caused exclusively by the weather. It was not as if Carter could have been confined to quarters or otherwise prevented from leaving the Holiday Inn.

Distilled down to the nub, who did what wrong? As phrased by this honorable Court, under the facts of this case, what was it that the Holiday Inn did that was unreasonable? There is no evidence that the Holiday Inn did anything unreasonable regarding the circumstances surrounding Carter's injury. In contrast, what was it Carter did that was reasonable under the circumstances? As a practical matter, nothing, and he also bore a duty to exercise ordinary care for his own safety just like the rest of us do.

While an accident, in theory, can have multiple substantial contributing factors leading to the event, there is only one proximate cause in this case and that was Carter's unreasonable conduct and it was the only reason why he fell.

CONCLUSION

WHEREFORE, Respondent/Appellee, Bullitt Host, LLC d/b/a Holiday Inn Express, respectfully submits its Brief, and prays that this honorable Court affirms the decisions of the Jefferson Circuit Court and Court of Appeals granting its Motion for Summary Judgment.

Respectfully submitted:

R. Hite Nally, Esq.
hnally@weberandrose.com
Russell H. Saunders, Esq.
rsaunders@weberandrose.com
WEBER & ROSE, P.S.C.
471 W. Main Street, Suite 400
Louisville, Kentucky 40202
Phone: (502) 589-2200
Fax: (502) 589-3400
Counsel for Appellee,
Bullitt Host, LLC d/b/a Holiday Inn Express